



UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

-----X **Docket#**  
GABRIEL RODRIGUEZ, : 2-cv-02436 (GRB) (JMW)  
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 :  
 Plaintiff, :  
 :  
 :  
 - versus - : U.S. Courthouse  
 : Central Islip, New York  
 WILLIAMS-SONOMA, INC. :  
 : August 5, 2022  
 : 3:31 p.m.  
 Defendant :  
-----X

TRANSCRIPT OF CIVIL CAUSE FOR TELEPHONE  
PRE-MOTION HEARING  
BEFORE THE HONORABLE GARY R. BROWN  
UNITED STATES DISTRICT JUDGE

**A P P E A R A N C E S:**  
**(VIA VIDEO/AUDIO)**

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1 THE CLERK: Calling case 22-cv-2436, *Rodriguez*  
2 *v. Williams-Sonoma, Inc.*

3 Counsel, please state your appearance for the  
4 record.

5 MR. KOPEL: Good afternoon, your Honor. This  
6 is Yitzchak Kopel of Bursor & Fisher, P.A. for the  
7 plaintiff. Joining with me today is my colleague Alec  
8 Leslie.

9 MS. HALE: Good afternoon, your Honor --

10 THE COURT: Okay.

11 MS. HALE: -- this is Ashley -- oh, sorry.

12 THE COURT: No, no, go ahead, go ahead. Sorry.

13 MS. HALE: Okay. You have Ashley Hale from  
14 Morgan Lewis for defendant Williams-Sonoma. And I have  
15 with me Dana Brady and Lincoln Bisbee.

16 THE COURT: Excellent. Anybody else? All  
17 right.

18 Okay, counsel, we're here for a pre-motion  
19 conference. And as you know from my rules and the order  
20 establishing today's conference, anyone can make any  
21 motion they want. I don't stop you from making motions.  
22 But I reserve the right to deem the motion made and  
23 decided based on the submissions, which by the way, were  
24 quite good, as well as the arguments of counsel. So feel  
25 free to argue anything you want.

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1           This is the defendant's motion so let me go to  
2 defendant and why don't you summarize the motions for me,  
3 please?

4           MS. HALE: Sure. Thank you very much.

5           So as your Honor knows, like other judges in  
6 the eastern and southern districts, I think you're  
7 becoming more and more familiar with these New York Labor  
8 Law 191 cases where the only claim is that employees were  
9 paid their full wages up to seven days late. This is not  
10 a case where the employee has not been paid. It's not a  
11 case where employees are working off the clock. These  
12 are just cases where employees have been paid every  
13 single penny they're owed but they are just claiming that  
14 half of their pay was paid in full but a week late. And  
15 so as a result of that payroll era, they are now entitled  
16 to a penalty of 100 percent of the late payment for the  
17 last six years.

18           This is a very important issue that can  
19 literally bankrupt a company that is otherwise fully  
20 employing their employees that we think will eventually  
21 go to the Court of Appeals.

22           So for this reason I will appreciate the  
23 opportunity to explain why we do not think the plaintiff  
24 can maintain the statutory penalty claim now.

25           Our first reason is that the plaintiff does not

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1 have Article 3 standing to assert this claim. As the  
2 Supreme Court recently explained in the *TransUnion* case,  
3 Article 3 grants federal courts the power to redress harm  
4 the defendants caused plaintiff, not a free wheeling  
5 power to hold defendants accountable for legal  
6 infractions.

7 So here plaintiff and their counsel who has  
8 filed no less than 25 of these exact same complaints over  
9 the last year are trying to hold the defendant  
10 accountable for legal infractions despite the fact that  
11 these employees, again who've been paid for every minute  
12 of work, has not actually been harmed. To show there's  
13 been harm which is --

14 THE COURT: Can I stop you for a second?

15 MS. HALE: Sure. Yes.

16 THE COURT: You're quite correct that we here  
17 in the eastern district are getting quite hip to many of  
18 these actions --

19 MS. HALE: Yes.

20 THE COURT: -- and issues and the *TransUnion*  
21 thing has had an incredible effect on the docket. So I  
22 understand the issue --

23 MS. HALE: Okay.

24 THE COURT: -- I got below except for one  
25 problem which is this. Let's assume, and I know there

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1 are other pieces to your motion. We'll get there.

2 MS. HALE: Sure.

3 THE COURT: Let's assume there was a right to  
4 be paid weekly. Let's just assume that. In that case,  
5 and this is harder to understand. You know, we're not in  
6 person. I'm assuming you're much younger than me. You  
7 must be because I'm old. But a year or two ago people  
8 who were younger than me, it was hard to explain the time  
9 value of money because interest rates were effectively  
10 zero. But that's changed. And that's always been  
11 different. Right? That always changes. In a world of  
12 interest rates, there is time value of money. So how can  
13 I say that they've had absolutely no harm and they lack  
14 any standing when the Supreme Court made clear if there's  
15 any harm at all, it's harm. Isn't that the same?

16 MS. HALE: Because he's not alleged that he's  
17 been harmed. He's just alleged that he could have  
18 invested, he could have earned interest on, or he could  
19 have done these things. He doesn't say that he was going  
20 to do them or that he's forewent the opportunity to do  
21 them which is what the *Smash Burger* case requires. It  
22 doesn't say that you could be harmed. You have to say  
23 that you forewent an opportunity. He could have, if he  
24 was paid weekly, he could have put the money under his  
25 mattress and then he would have no harm at all. So the

1 complaint has conclusory allegations of what he could  
2 have done with the money. It does not allege that he  
3 actually was harmed.

4           And I think that all of the time value of money  
5 cases predate the Supreme Court's decision in *TransUnion*  
6 and the Second Circuit's decision in *Maddox* and the  
7 eastern district's decision in *Smash Burger* saying that  
8 you have to have factual allegations that you forewent  
9 the opportunity to invest or use the money. It doesn't  
10 say anything about that you have to actually have those  
11 allegations. And here there is no claim that the  
12 plaintiff forewent any of these opportunities. And it's  
13 not like the money was withheld for years and years and  
14 years. It was one week, so --

15           THE COURT: Well yes, I understand that. But  
16 let's assume, right, I mean (indiscernible) Rule 12  
17 motion and allow liberal pleading. You know, the  
18 plaintiff (indiscernible) from time to time this  
19 plaintiff deposited some piece of his salary, maybe it  
20 was \$4 a month, whatever it is, into a bank account.  
21 They're there, right? That crosses the (indiscernible),  
22 yes?

23           MS. HALE: If it was -- he has not alleged that  
24 it is an interest bearing account that it was put into.

25           THE COURT: Okay. So clearly it's the

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1 allegation, right? That from time to time he put money  
2 into a bank account even if it was \$4 a month and that he  
3 was not paid interest. We're there, yes? At that point.  
4 That's some harm. It's not -- it's small and --

5 MS. HALE: Right. But that's not what is  
6 alleged here.

7 THE COURT: Okay. I hear you. I hear you.  
8 Okay. I hear that point. Let me actually just stop you  
9 right there and I'm going to go to plaintiff and say are  
10 you in a position to make any such allegation?

11 MR. KOPEL: I'm sorry, your Honor, I didn't  
12 hear that question clearly.

13 THE COURT: I said are you in a position to  
14 make any such allegation? Meaning I said that if your  
15 client alleges at some point in time he would deposit  
16 some portions of his salary into a bank account that paid  
17 some degree of interest, can you make any such  
18 allegation?

19 MR. KOPEL: The answer is yes, but that  
20 allegation would transfer our current allegations which  
21 are concrete into something which is hypothetical. It's  
22 the exact opposite of what Ms. Hale is arguing right now.  
23 So --

24 THE COURT: No, no, no. Wait, wait, wait. You  
25 didn't see the problem, right?



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1 MR. KOPEL: So the answer is yes. I'm sorry.

2 THE COURT: Okay. Well yes, I'm just saying  
3 it's a fact that most people don't spend every penny and  
4 they put some money in the bank. Right? So her argument  
5 to me is he said he forewent investment opportunities  
6 without being specific. But if he actually put some  
7 money in the bank and it paid some interest, even if it's  
8 a quarter of a cent or whatever he lost, I think you've  
9 caused the concrete standing issue. See what I mean?

10 MR. KOPEL: Of course. But I think we already  
11 did without saying that because I don't think you need to  
12 say what someone hypothetically would have done if he had  
13 the money. That is hypothetical what he would have done.  
14 The concrete injury is that he was deprived of the use of  
15 money and that's exactly what we alleged. It's like  
16 saying if I win the lottery, what would I do with the  
17 money? And that's a fun exercise but it's speculative.

18 THE COURT: No, but not really in the following  
19 sense. I would presume that your guy actually did -- you  
20 made an interesting argument that I didn't think about  
21 which is inflation. Right? You know, you can show that  
22 he bought gas one week and didn't get the money till the  
23 next and so therefore he paid more money, he paid more  
24 for the gas that he bought, or something. There's some  
25 other way to do this. But I'm saying if you have, not

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1 hypothetical, but he actually used a bank, a bank account  
2 that paid interest, right, to house some or all of his  
3 savings from his salary, that strikes me as even more  
4 concrete than your suggestion that he would have invested  
5 money. You see what I mean?

6 MR. KOPEL: I assume, but it's still  
7 speculative that he would use specific money for a  
8 specific purpose. The answer is I am not familiar, you  
9 know, with the specifics of my client's bank account. I  
10 have no doubt if I speak with my client I could learn  
11 that there is either a bank account or there was some,  
12 you know, some issues paying bills from time to time, or  
13 even just merely the inability to buy something maybe  
14 that he wanted to buy at some point.

15 But you know, I do want to urge the Court to  
16 consider that none of that is what's required. The case  
17 law is very clear that the time value of money has worth  
18 itself, and we've noted that in our letter. The Seventh  
19 Circuit has said that. Judge Cote has said that. This  
20 issue --

21 THE COURT: Right. Just --

22 MR. KOPEL: I'm sorry. Go ahead, y.

23 THE COURT: Counsel, you kind of had me at  
24 hello on this one. I'm kind of with you. Right?

25 MR. KOPEL: Okay.

1 THE COURT: That's not to say that certain  
2 problems aren't coming. But on this particular issue I  
3 tend to side with you.

4 Let me go back to defendant's counsel. And  
5 tell me about this issue about whether or not there's a  
6 private right of action under the statute.

7 MS. HALE: So, your Honor, we do not believe  
8 there is a private right of action under the statute.  
9 For 130 years, no one thought there was a private right  
10 of action. This is enacted in 1890. And until *Vega*,  
11 which is a seven paragraph opinion which I think Judge  
12 Chen called tortured, and all of a sudden found this  
13 private right of action. We think one, *Vega* is wrong.  
14 And when the Court of Appeals gets this issue before it,  
15 we think they will find it wrong. And we also think that  
16 under *Concur* it's no longer good law. *Vega* is wrong  
17 because it didn't analyze the structure of the New York  
18 Labor Law, it didn't examine how the DOL is actually  
19 tasked with enforcing non-wage claims, didn't review the  
20 statutory history which is simply too long to discuss on  
21 the phone today, so we would appreciate the opportunity  
22 to brief that. And so *Vega's* decision created this tidal  
23 wave of this class action litigation seeking colossal  
24 damages for payroll errors.

25 And so we think that neither the text of 191 or

1 198 provides an expressed private right of action  
2 regarding the frequency with which payroll is processed.  
3 There's no reference to damages or civil action, so  
4 there's no private right.

5 And so where there is a private right of  
6 action, it is specifically called out. So for example,  
7 198.1B says there's a private right of action for failure  
8 to provide a wage notice. 198.1D says there's a private  
9 right of action for failing to provide wage statements.  
10 But there's no reference in 198 to a private right of  
11 action for a 198 frequency of pay violation. The Labor  
12 Law -- the legislature gave the DOL, not private parties,  
13 authority to enforce these non-wage claims for frequency  
14 of pay violations. And then New York Labor Law 218  
15 explains the discretion that they get to use to impose  
16 the penalties.

17 So it's not that there is no incentive or  
18 penalty if the company does not comply with the  
19 requirements to pay weekly. The DOL can issue fines if  
20 it finds that the company is failing to comply. But 191  
21 and 198 have no expressed private right of action.

22 And then the recent decision in *Concur* by the  
23 Court of Appeals makes clear that you cannot infer a  
24 right of action. And they went through the three factor  
25 test to see if you can imply a private right of action so

1 if it's a class who benefits the statute was enacted or  
2 would promote legislative purpose or if it's consistent  
3 with the legislative scheme. And they found that because  
4 the statutory scheme in Article 6, which is where New  
5 York Labor Law 191 falls, provides two robust enforcement  
6 mechanisms, you know, you can't find another enforcement  
7 mechanism beyond the statute's comprehensive scheme.

8           So where the legislature intends for an Article  
9 6 provision to be enforced individually, it expressly  
10 provided a private right. And here, 191 is in Article 6  
11 and there is no private right of action for the frequency  
12 of pay violation.

13           THE COURT: Right. So I'm going to say  
14 something now. Let me just shorthand this. It's Friday  
15 afternoon, everybody wants to go home. Plaintiff's  
16 counsel, I assume you agree, based on Vega, et cetera,  
17 yes?

18           MR. KOPEL: Well that I agree what based on  
19 Vega? I'm sorry.

20           THE COURT: You disagree. You disagree. You  
21 think you're right.

22           MR. KOPEL: Of course, of course I disagree  
23 based on the --

24           THE COURT: Right. So here's why, and I would  
25 love to hear from you but it's Friday afternoon and I

1 want to get everybody home. So I just want to say I  
2 didn't think this was an issue at all. I had it in  
3 another case and in fact, I'm going to give you the  
4 citation on that case, if you all want to look at it.  
5 It's *Birthwright v. Advance Auto Parts*. I don't have the  
6 CV number in front of me, but they're briefing that for  
7 me on August 29th.

8           And the reason I bring that up is because when  
9 defense counsel in that case first brought -- oh by the  
10 way, I do have the CV number. It's 22-593 if you want to  
11 look at the papers when they come in. When defense  
12 counsel first raised that I said come on, I was imagining  
13 just settle these cases, and we've done 1,000 of them.  
14 What are you talking about? And then I heard this  
15 argument which is similar to the argument I heard today.

16           So it sounds to me like it's a horse race. And  
17 what I'm going to say to you all is I'm going to need you  
18 to brief that one for sure. Right? Because we've got to  
19 look at that. I'm going to look at it in *Birthwright*.  
20 I'll look at it in this case. Maybe I'll issue a joint  
21 opinion for both cases. I would love to certify the  
22 question to the Court of Appeals of New York State but of  
23 course I'm not allowed to do that. And I only say that  
24 for one reason, just to that my own problems for a  
25 moment, I recently learned that most other states allow

1 district judges to do that. But here only the Court of  
2 Appeals can do it. So I have to guess and get it wrong,  
3 and then they send it to the Court of Appeals and say oh  
4 he's so wrong. So you know, we'll see how this goes.  
5 But I'm going to give it my best shot. Okay?

6 But it does sound to me like an interesting  
7 issue and I'm happy to take a look at it. But both of  
8 you, and unfortunately, like the other case I mentioned,  
9 it sounds like it has great counsel on this case too. So  
10 I'm sure you'll do a great job. And then I'll try to  
11 figure this one out because it is an interesting issue.  
12 I understand that the only, I believe the only Appellate  
13 Division case is the Third Department's case which how  
14 that binds me is an interesting question I think. I'm  
15 supposed to yield to Second Department law and if there  
16 isn't any, I guess we're writing on a blank slate. I  
17 don't know.

18 So at the end of this we'll figure out how long  
19 it's going to take to brief that and how we'll set that  
20 up. Okay?

21 But let's jump to the last two issues. And  
22 again, to save time, I know you have these issues about  
23 whether this is a failsafe class and so forth. My only  
24 question here is why isn't this -- why weren't those  
25 issues more properly conserved and raised at the time

1 where we do class certification, assuming we get that  
2 far?

3 MS. HALE: So this is the simplest way that I  
4 think about how this is a failsafe class. The complaint  
5 defines the class as all manual workers employed by  
6 defendant in New York State over the last six years. If  
7 somebody told me right now hand over a list of manual  
8 workers, hand me the class list, I couldn't do it. I  
9 don't know who is on that list until I look at every  
10 employee in the state and see what did they do, how long  
11 did they do it, where did they do it, are they in  
12 Williams-Sonoma, are they in West Elm? Which store? Who  
13 is the manager? What did this manager ask to do? What  
14 did that manager do? I can't find a class list without  
15 determining the ultimate question of liability which is  
16 is this person doing manual work?

17 THE COURT: Right. Well presume --

18 MS. HALE: I couldn't make a class list.

19 THE COURT: I hear you. And of course we're  
20 not there yet. Right? That would be part of sort of the  
21 class discovery piece I think. But the plaintiffs,  
22 plaintiff's counsel has one plaintiff, right? They have  
23 a plaintiff who will come in and say I was there and I  
24 only got paid biweekly. So I don't know if that's  
25 something that's done by worker or by sort of category.



1 So whatever the position was, forgive me, I'm not  
2 remembering at this moment, you know, he's a store  
3 manager or --

4 MS. HALE: He doesn't say. He doesn't say. We  
5 actually don't know his position.

6 THE COURT: But you know what he did. Right?  
7 You have it somewhere. And you say okay, he was a store  
8 clerk and he claims, right, that more than 25% was manual  
9 labor or whatever. So the question becomes isn't it a  
10 class of store clerks if that were the right word?

11 MS. HALE: But that is not -- he doesn't say  
12 that. He doesn't say it's a class of store clerks. He  
13 just says it's all manual workers. So he doesn't say  
14 he's a clerk. He doesn't say what he does. He -- in  
15 fact, I don't even think in this complaint says that he  
16 worked at West -- he does say that he worked at West Elm.  
17 He just said that he worked at West Elm doing manual  
18 labor. That's it. And so it is the class definition we  
19 think is per se and proper.

20 So it can be addressed at the pleading stage  
21 because it requires to find out who was in the class,  
22 there has to be a determination basically on liability as  
23 to whether someone is a manual worker.

24 THE COURT: All right. So let me go back to  
25 plaintiff's counsel and say she threw down the gauntlet.

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1 She used language. She said it's not a per se class.  
2 What do we do here? What's the story on the class  
3 situation?

4 MR. KOPEL: Yeah. I think defense counsel  
5 perhaps inadvertently said that she can't tell who's a  
6 manual worker until she goes through the evidence and  
7 that's exactly right. We need to go through the evidence  
8 to understand the various jobs that exist at the  
9 defendant's companies and only then can we really narrow  
10 it down.

11 THE COURT: Let me ask you a question that I  
12 think defense counsel is hitting on but it's not really  
13 essential to our argument, but I find much more  
14 interesting which is this. Let's assume that -- do you  
15 know the title that your guy held at the place?

16 MR. KOPEL: I do but I don't have it in front  
17 of me. I'm sorry.

18 THE COURT: Neither do I. That's fine. But  
19 let's say, you know, he's a salesperson or floor -- I  
20 think he was like a floor salesperson if I remember the  
21 papers right. Something like that.

22 MR. KOPEL: He was unloading inventory from  
23 trucks and unpacking it, et cetera.

24 THE COURT: Right. But my only question to you  
25 is this. If floor salespeople, right, or floor

1 representatives, whatever he was called, if some of them  
2 would fall into the category of manual laborers and  
3 others don't, what do we do? If it's not across a title.  
4 How do you handle that? Is it one of those situations  
5 where you say well then we can't actually have a class  
6 because each person has to have a separate hearing.

7 MR. KOPEL: I think that that's an argument  
8 that, you know, would be very hypothetical and maybe the  
9 defendant could consider that based on what comes to  
10 light in discovery.

11 THE COURT: Okay.

12 MR. KOPEL: But that question only highlights  
13 the futility of discussing this right now. There's an  
14 imbalance of access to information. And class  
15 certification, the Supreme Court has said, has to be  
16 based on evidence. So they can't -- they're trying to  
17 demand something impossible from me by saying I need to  
18 have had the evidence before I filed the complaint and  
19 that's simply not the standard.

20 THE COURT: Yes. No, you kind of had me at  
21 hello except for that little interesting issue about -- I  
22 can imagine, right, if you have like people in a detailed  
23 circumstance, sometimes one person might just work the  
24 cash register all day and the other person might be  
25 actually unloading trucks, but they have the same title.

1 So what do you do?

2 MR. KOPEL: I don't think that's going to be --

3 MS. HALE: So how --

4 MR. KOPEL: I'm sorry, let me just respond,  
5 please. I don't think that that's going to be an issue  
6 because there's going to be job titles and there's going  
7 to be job responsibilities and there is going to be, you  
8 know, maybe if someone just works a cash register on  
9 certain days but they're doing other things on other  
10 days, you know, the Department of Labor says it depends  
11 on what percentage of their job was spent doing physical  
12 labor. And I believe the evidence is going to show that  
13 a large super majority of employees at these companies  
14 were doing physical labor a minimum of 25 percent of the  
15 time.

16 But if the evidence shows otherwise, then when  
17 we move for certification, we will move for a narrower  
18 class which is permissible, and that's what we're  
19 supposed to do.

20 So you know, again, I don't think it's  
21 appropriate to really examine or think too hard about  
22 these questions now because I don't have the evidence.  
23 And it's just unfair to expect to have an answer now when  
24 we don't know what the evidence shows.

25 THE COURT: So I'm sorry, I --

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1 MS. HALE: Your Honor, if I --

2 THE COURT: Let me just say this to counsel as  
3 sort of a hypothetical. I moonlight as a professor, so I  
4 can't help it. You know what I mean? I just have to do  
5 it because of law school, a hypothetical question. Sorry  
6 about that. Anyway, I apologize.

7 Back to defendant's counsel, please. Yes, go  
8 ahead.

9 MS. HALE: But your Honor, I think you are  
10 hitting on the exact point of why this is a failsafe  
11 class. If there is a person who is a cashier who never  
12 does any manual work, that person is not a manual worker  
13 and would not be included on a class list, and would not  
14 be included on a class. And so to know that, we would  
15 have to look at that person and then they get excluded  
16 from the class. A determination has been made about  
17 potential liability as to that person and that is the  
18 exact definition of a failsafe class.

19 The ultimate question is in the definition of  
20 the class. It's just impermissible even at this stage.  
21 I understand that certification and discovery to find out  
22 more information, but the way the class is defined by  
23 using the term manual worker, it's improper at this stage  
24 for the exact reasons that you pointed out.

25 THE COURT: Okay.

1 MS. HALE: We can't determine who's a manual  
2 worker without looking at each person individually.

3 THE COURT: Understood. All right. Thank you.

4 Counsel, let me just say I'm going to rule on  
5 this in part. And before I do that, let me just say,  
6 because you won't care, once I rule you're not going to  
7 care about this part, but everyone did a really good job.  
8 Thank you for that. It's refreshing to have really good  
9 lawyers who know the stuff and are prepared and get the  
10 arguments and even put up with my hypotheticals. So  
11 thank you.

12 That said, I'm going to rule on the motions in  
13 part.

14 First of all, as I mentioned at the beginning,  
15 I reserve the right to deem the motion made and rule on  
16 it. And the reason I'm doing that is to try to save  
17 everybody time and effort and move things along more  
18 quickly consistent with Rule 1. We have an obligation to  
19 do so as well as the rules of human decency and try not  
20 to be wasteful.

21 So to save everyone some time, I'm going to  
22 rule on parts of this.

23 On the standing issue, counsel raises a very  
24 point under *TransUnion* which has really made us look hard  
25 at the question of standing in many, many cases

1 particularly cases like these that have statutory  
2 penalties and so forth. But in this instance, I believe  
3 that the allegations are sufficient. And of course when  
4 I'm ruling on a motion to dismiss, I have to assume the  
5 allegations to be true and I have to draw all inferences  
6 in favor of the non-movant, and that's what I'm doing.  
7 And in doing that I do believe there's sufficient  
8 inference here that the plaintiff had some actual  
9 concrete loss if in fact the claim proves to be the case.  
10 That is he was entitled to weekly pay and he got biweekly  
11 pay. There is based on time value of money some  
12 inferential basis to believe that there was some loss.  
13 It could be very small. But as Judge Kavanaugh wrote in  
14 *TransUnion* I think, certainly in one of those recent  
15 cases, he said look, any loss is loss. Any kind of  
16 injury, even the smallest amount, so it could be a  
17 fraction of a cent. And I believe it's a reasonable  
18 inference or plausible inference. Plaintiff could have  
19 lost money either in the form of less money in the bank  
20 earning less interest or buying things at a higher cost  
21 because of inflation or something else like counsel  
22 suggests, like inability.

23           So I think there's certainly enough there. So  
24 I'm going to deny that branch of the motion.

25           And then as to the class as but, the so-called

1 failsafe class argument, I'm going to deny those at this  
2 juncture. I'm not saying that I disagree. In fact, I  
3 have some instant questions about how we do this, whether  
4 we do it by a title or whatever. But I do think that  
5 that's appropriately saved for the class certification  
6 juncture assuming that we get there. And of course I  
7 remind everybody that at some point if we certify a class  
8 here, we also have the right to decertify a class. So  
9 discovery will bear out that which we will be able to do  
10 or not do if it works consistent with Rule 23. So we'll  
11 get to those issues.

12           So I'm denying those three prongs of the  
13 motion.

14           As to the remaining piece, as I've already  
15 indicated, I think there's a very interesting issue as to  
16 whether there's a private right of action. I was  
17 surprised to learn that myself because I've seen these  
18 cases for years and no one ever brought it to me until  
19 recently.

20           So I'd like to give you some time to brief it.  
21 As I indicated, I am getting briefs from another case on  
22 August 29th. Obviously I'm not going to make you spend  
23 the last weeks of your summer doing this. But I would  
24 like to do it as soon as we can.

25           So let me start with offense counsel. How long



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1 would it take you to serve your brief just on that issue?

2 MS. HALE: Just on the private right of action?

3 THE COURT: Yes.

4 MS. HALE: What's today? The 5th.

5 THE COURT: Yes. Take your time so you can do  
6 a good job.

7 MS. HALE: I was going to say we have -- I know  
8 my team has some vacations in August and Labor Day is  
9 coming up. Could we say September 16th? Too far?

10 THE COURT: Of course, of course. I am  
11 reminded of Judge Spatt. You all might not remember  
12 Judge Spatt who'd say what is this vacation nonsense? It  
13 is time for lawyers to do (indiscernible).

14 And plaintiff, how much would you like to  
15 serve, let me make it clear, to serve, and we're going to  
16 use the bundling rule here, a responsive brief to that?

17 MR. KOPEL: 30 days, please, your Honor.

18 THE COURT: Okay. So that brings us to about  
19 October 16, something like that.

20 MR. KOPEL: Yes, that sounds right.

21 THE COURT: Okay. And the time for reply for  
22 the defendant, you want another week or so? What do you  
23 think?

24 MS. HALE: Sorry, I was on mute. Two weeks or  
25 so?

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1 THE COURT: Two weeks? Yes. Sure.

2 MS. HALE: Okay.

3 THE COURT: So two weeks for a reply. At this  
4 point, you will bundle all the papers and serve them all  
5 at once, right? And file them all at once I mean.

6 MS. HALE: Yes.

7 THE COURT: Don't file them --

8 MS. HALE: Yes.

9 THE COURT: It's kind of a nightmare for us  
10 over here.

11 So you'll do that. So what is that,  
12 approximately I think 84 days I'll look for your filings.  
13 I'll be looking forward to your filings in the midst of  
14 all my jury trials and everything else. But I'll look at  
15 my clerks and say it's 84 days, where is that brief? And  
16 we'll dive right into it. So I'll be looking forward to  
17 that. All right?

18 MS. HALE: Okay. Yes.

19 THE COURT: Is there anything else I can do for  
20 either side today?

21 MR. KOPEL: Your Honor, just out of my  
22 curiosity, does the Court intend on issuing a decision in  
23 the *Birthwright* case, you know, ahead of our briefing?

24 THE COURT: I don't like to issue advisory  
25 opinions and so forth, but I'll tell you this. I tend to

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1 like to group them. So you might see a joint opinion  
2 issued for both opinions, for both cases. So I mean you  
3 could watch that one. But I think I probably will hold  
4 that until you guys file and then issue an opinion at the  
5 same time.

6 MR. KOPEL: Okay. Thanks very much. My only  
7 other question is will -- I suppose the Court will enter  
8 an order denying certain parts of the motion to dismiss?  
9 Or is the order just kind of as spoken now?

10 THE COURT: Yes, the law, as Judge  
11 (indiscernible) said, the law does tumble from our left.  
12 You can get a transcript of today if you really want it.  
13 We'll probably enter a minute order indicating that the  
14 rulings are on the record but you'll understand. I've  
15 denied 1, 3, and 4 and you're briefing 2. Yes?

16 MR. KOPEL: Thank you. Understood.

17 MS. HALE: Yes.

18 MR. KOPEL: Thank you, your Honor.

19 THE COURT: All right?

20 MS. HALE: Thank you.

21 THE COURT: Go have a great summer weekend and  
22 I look forward to talking to you in the fall. Okay?

23 MR. KOPEL: Okay. Thank you.

24 MS. HALE: Thank you very much.

25 (Matter concluded)

C E R T I F I C A T E

I, MARY GRECO, hereby certify that the foregoing transcript of the said proceedings is a true and accurate transcript from the electronic sound-recording of the proceedings reduced to typewriting in the above-entitled matter.

I FURTHER CERTIFY that I am not a relative or employee or attorney or counsel of any of the parties, nor a relative or employee of such attorney or counsel, or financially interested directly or indirectly in this action.

IN WITNESS WHEREOF, I hereunto set my hand this 8th day of August, 2022.

  
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